No. 12426.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY D. LECKAS,

Appellant,

vs.

CATALINA ISLAND STEAMSHIP LINE,

Appellee.

CATALINA ISLAND STEAMSHIP LINE,

Cross-Appellant.

vs.

HARRY D. LECKAS,

Cross-Appellee.

Brief of Appellee and Cross-Appellant Catalina Island Steamship Line.

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APPELLEE'S BRIEF.

Preliminary Statement.

Appellee will answer appellant's opening brief and under separate headings will then present its points in support of its cross-appeal.

Appellee does not believe that the appellant has set forth a sufficient statement of the case to give the Court the entire picture involved on these appeals. Appellee does not agree that appellant's "Statement of the Case" is complete and will set forth its own view of the record.

Statement of the Case.

From the time the libelant became employed by the Catalina Island Steamship Line, then known as Wilmington Transportation Company, up to and including the day he sustained his injury, he was at all times a member of the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association. [Rep. Tr. p. 10.]

A contract between the union of which the appellant was a member and the respondent was offered in evidence as Libelant's Exhibit 1. [Rep. Tr. p. 9.] It was agreed by libelant that said contract "sets forth the terms of the employment." [Rep. Tr. p. 22, lines 10-12.]

The written contract is in two sections. The original agreement which became effective October 15, 1945, appears in the Apostles commencing at page 22. An amendment thereof appears in the Apostles commencing at page 18 and this amendment provides that it was effective as of July 1, 1946, with an expiration date of December 31, 1946, or thereafter on due notice.

No evidence was introduced showing that this contract was continued in force after December 31, 1946.

The contract provided for a "daily rate of pay" in so far as the employees covered by the agreement are concerned and with particular reference to an oiler, the daily rate of pay was fixed at $10.88. Overtime work between 8 A. M. and 5 P. M. any day was to be paid at the rate of $1.50 per hour. Overtime work between 5 P. M. and 8 A. M. was to be paid for at the rate of $1.70 per hour.

The contract and the amendment thereof were executed at Wilmington, California. [Ap. pp. 33 and 20.]

It was stipulated that on November 8, 1946, the libelant, upon completing his work for that day aboard the SS Catalina, left the vessel, proceeded through the premises occupied by the respondent and known as the Terminal Building, and entered a public street in Wilmington known as Water Street, crossed the street car tracks which are located north of the building occupied by the respondent as a terminal, and got upon the public sidewalk on Water Street, turned to the west and was walking down the sidewalk in a westerly direction, at which time he was struck by an automobile; and that as a result of that accident libelant sustained bodily injuries and was confined to the San Pedro Hospital and the McCornack General Hospital from the 8th day of November, 1946, and then again in the San Pedro Hospital, after having been confined in the McCornack General Hospital, and was discharged from the San Pedro Hospital on the 22nd day of January, 1947. [Rep. Tr. p. 4, line 21, to p. 5, line 20.]

It was stipulated that Libelant's Exhibit 2 depicts the physical situation existing on the day of the accident. At the bottom is a diagram purporting to represent the SS Catalina and then on the land side of the Catalina are the premises occupied by the respondent. The space north of the premises shows the public street. The path of Mr. Leckas appears on the diagram, showing how he got to the place where he was hurt. [Rep. Tr. p. 11, line 24, to p. 12, line 10.]

It was stipulated that the libelant was never served any meals aboard the vessel. [Rep. Tr. p. 15, lines 15-17.]

It was stipulated that the voyage of the SS Catalina, the vessel involved, between Los Angeles Harbor and Catalina Island, is a coastwise voyage; that the vessel is

to be treated as a coastwise vessel and that each voyage is a coastwise voyage. [Rep. Tr. p. 16, line 21, to p. 17, line 6.]

Libelant had been employed on the SS Catalina through a hiring hall. [Rep. Tr. p. 17, lines 15-25.]

Libelant received his pay twice a month, on the 5th and the 20th of each month. [Rep. Tr. p. 22, lines 14-17.]

The men in the engine room crew leave the vessel as soon as they shut down the plant. Every evening the plant is shut down. As soon as the plant is shut down everybody leaves the ship. [Rep. Tr. p. 24, line 4, to p. 25, line 4.]

In June of 1946 the libelant lived at 484 West Third Street, San Pedro, and had lived there since May 29, 1946. During the time when he was working aboard the Catalina he was not furnished any meals aboard the vessel and wasn't furnished any sleeping quarters. Each day when he finished his work he went home. [Rep. Tr. p. 28, lines 2-15.]

Libelant went down to the vessel at 8 o'clock in the morning as a regular thing unless the engineer told him the night before to come back at 6 A. M. He received overtime for the two hours between 6 A. M. and 8 A. M. on those days when he was told to come down early. He also received overtime for all work performed after 5 o'clock P. M. On one day during each week libelant didn't do any work at all and didn't go down to the vessel on that day. [Rep. Tr. p. 29, lines 5-25.]

Libelant's hours at the time of the accident were from 8 A. M. to 12 noon and from 1 P. M. to 5 P. M. He happened to be on the watch which brought the ship back

to the mainland at that time. That was the reason he was shutting the plant down. [Rep. Tr. p. 30, lines 11-16.]

There was never a day when libelant was called from his home at night to come down to the ship. [Rep. Tr. p. 31, lines 9-11.]

During all the time libelant was working aboard the Catalina he supported himself by providing his own lodging and purchased all food out of his earnings. [Rep. Tr. p. 33, lines 4-8.]

Respondent's Exhibit A [immediately following Apostles p. 35] is a report of ship personnel not shipped or discharged before a United States Shipping Commissioner and covers voyages of the SS Catalina from No. 4864 to No. 4889.

Edward Mussetter, the master of the SS Catalina, testified without contradiction or conflict, that the figures "4864 to 4889" shown on Respondent's Exhibit A covered twenty-five or twenty-six *separate* voyages. [Rep. Tr. p. 36, lines 7-24.]

During the time Edward Mussetter was master of the SS Catalina the crew members did not at any time sign any articles of any kind pertaining to the vessel. The only papers they ever signed were their social security and unemployment insurance papers. When the SS Catalina was tied up at the dock at Wilmington at the end of each voyage, the crew members never asked permission from the master to go ashore. [Rep. Tr. p. 37, lines 12-21.]

It was stipulated that from May 18, 1946, to November 8, 1946, libelant earned basic wages of $10.88 per day which with overtime amounted to $2,204.22; that he was paid for 121 meals at one dollar per meal, amounting to

gross earnings of $2,325.22; that income tax withheld amounted to $358.25, state unemployment insurance withheld amounted to $23.26, federal old age insurance amounted to $23.26, and that his net earnings were $1,920.45. [Rep. Tr. p. 41, line 24, to p. 42, line 8.]

L. H. Connor, Operating Manager of the respondent, testified that when the vessel left Wilmington in the morning and then got back in the evening the company had no intention of sending the vessel out on more voyages or trips. [Rep. Tr. p. 43, lines 16-20.]

A stipulation with reference to this situation is shown by the following portion of the record:

> "Mr. Gallagher: On any day. What I am trying to prove, your Honor, is simply this: They have a schedule. When both ships were operated they left at a certain time and they were supposed to get back at a certain time. When they were back and docked there wasn't any other work for the ship to do. In other words, nobody would show up with freight or they wouldn't take passengers any place. It was just over in the morning and back in the afternoon, and that was the end of it.
>
> The Court: There is nothing to do until tomorrow, ordinarily?
>
> Mr. Gallagher: That is right.
>
> The Court: There is no issue about that?
>
> Mr. Fall: There is no issue about it, no. I mean, I would stipulate that was the fact.
>
> The Court: You stipulate this vessel carried both passengers and freight?
>
> Mr. Fall: Yes.
>
> Mr. Gallagher: Yes, your Honor.

The Court: Normally, as I understand your position, it is that once the ship ties up on the return trip in the evening of any given day, there is no business contemplated until the next morning.

Mr. Fall: That is correct.

Mr. Gallagher: That is correct, your Honor." [Rep. Tr. p. 43, line 23, to p. 44, line 22.]

Outline of Argument.

Appellee will argue in this section of the brief only the proposition that the libelant is not entitled to recover wages from the 9th day of November, 1946, for any period of time thereafter.

ARGUMENT.

POINT I.

Appellant Is Not Entitled to Recover Wages During the Period of His Disability.

The first important proposition involved is the failure of the libelant to prove that the SS Catalina was actually in operation at any time subsequent to November 30, 1946. Respondent's Exhibit A might suffice as proof of the fact that the vessel operated up to and including November 30, 1946, but does not constitute proof that the vessel was operated thereafter during the period within which the libelant claims wages.

The second important proposition is that in the Assignments of Error the appellant claims that

> "the district court erred in not finding that the libelant was entitled to recover from respondent, wages from the 9th day of November, 1946 to and including the 26th day of June, 1947, in the sum of $3,799.88." (Appendix, App. Op. Br. par. III.)

The uncontradicted evidence shows that the libelant was re-employed on the 14th day of April, 1947. The elapsed time between May 18, 1946, and November 8, 1946, was 171 days. The uncontradicted evidence, consisting of a *stipulation,* was that the gross amount of actual earnings by the appellant consisting of basic wages at $10.88 per day plus overtime, was the sum of $2,204.22 from May 18, 1946, to November 8, 1946.

The elapsed time between November 8, 1946, and April 13, 1947, is 157 days. This would be slightly in excess of 22 weeks and if the libelant had proved, which he did not, that he would have been employed six days of each week during said 22 weeks, he would have earned basic wages of $65.28 per week or a total of $1,436.16. The libelant would certainly not be entitled to overtime on some conjectural basis and neither would he be entitled to subsistence of a dollar per meal for the simple reason that while he was actually working he was allowed this one dollar solely because of the fact that he had missed a meal on 121 days of the total number of days he worked between May 18, 1946, and November 8, 1946.

The appellant has certainly failed to support his Assignment of Error No. III.

Appellee respectfully contends, in view of the fact that the contract between the union and the respondent is a California contract, that the law of California will prevail in construing said contract.

Pursuant to the provisions of Section 3001 of the Labor Code of California

> "a servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to

be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term."

Section 3002 of the same code provides

"in the absence of any agreement or custom as to the term of service, the time of payment, or the rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed."

Section 3003 of the same code provides that

"if after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service."

The evidence shows, without conflict, and is supported by stipulation and agreement of the parties, that on each day there was a separate and distinct voyage of the SS Catalina. The written contract provides for wages at a daily rate.

Pursuant to the provisions of the written contract between the union and the respondent, there was no obligation of any kind or character imposed upon the appellant to perform any kind of work or labor for the respondent for any period in excess of one day and there is likewise no obligation on the part of the appellee to employ the appellant for more than one day. The appellant could have quit at the end of any particular day and voyage without violating any provision of the contract and the same privilege was accorded the appellee in that it could have discharged the appellant at the end of any particular day and voyage.

Contrasted with the foregoing situation is the usual agreement contained in shipping articles where a seaman binds himself for a particular voyage, the extreme length of time of such voyage usually being stated. If a seaman is employed on a coastwise voyage from Los Angeles to Seattle and return he, of course, is entitled to retain his employment in the absence of misconduct until the coastwise voyage is completed and the same is true with reference to foreign voyages. Such contracts are sometimes cast in the form referred to in the case which appellant seems to rely upon in support of his contention.

In the case of *Enochsson v. Freeport Sulphur Co.*, 7 F. 2d 674, the shipping articles provided as follows:

> "It is agreed between the master and the seamen or mariners of the steamship Freeport Sulphur No. 1, New York, of which C. G. Haslund is at present master, or whoever shall go for master, now bound from the port of Freeport, Texas, to Tampico, Mexico, and return: also trading to or between the United States and the Republic of Mexico or the West Indies as the master may direct, and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States *for a term of time not exceeding six calendar months.*" (Emphasis added.)

It is at once apparent from the provisions of the articles that the libelant referred to in said case, who was signed as third mate, bound himself to serve the vessel for at least six months.

In *Mason v. Evanisevich*, 131 F. 2d 858, the seaman had been employed for a fishing season.

There is nothing in the written contract involved in the case at bar which specifies that the appellant was to be employed for any period of time beyond a day.

The appellant contends, at the bottom of page 8 of his opening brief, that

> "there can be no question that appellant was employed *during the seasonal operation* of the SS 'Catalina' to which vessel he returned as soon as he had recovered from his injury."

There is considerable question about this contention made by the appellant, particularly in view of the fact that he does not refer to any evidence or any portion of the contract which supports his gratuitous statement.

The appellant in the case at bar was free to do as he pleased from the time he left the vessel until the time he reported for duty the next morning. There is absolutely nothing in the written contract which requires him to obtain shore leave.

It is true that the trial court found that

> "the respondent herein employed the libelant as an oiler upon the SS 'Catalina' as a *permanent* employee at wages in the sum of $10.88 per day, overtime, and one dollar per day subsistence, on a six day per week basis." [Ap. p. 43.]

But this Court is not bound by any finding made by the trial court in an admiralty case and this is particularly true when a finding is not supported by substantial evi-

dence. It is also the law as it is understood by appellee that this Honorable Court is not bound to accept a finding made by a trial court in an admiralty case if the evidence on the subject is uncontradicted so that there is no question of credibility of witnesses involved.

Appellant also contends that the fact that the trial judge found he was "a permanent employee" means that he was on the pay roll *ad infinitum.*

It is respectfully contended by appellee that the appellant has not shown any good reason upon which the decree of the trial judge to the effect that the appellant was not entitled to wages should be reversed or interfered with. Judge Mathes gave this matter careful consideration and appellee respectfully contends that the decision and decree of the trial court with reference to wages was correct and in strict accordance with the applicable law.

CROSS-APPELLANT'S BRIEF.

In accordance with the suggestion made by the Clerk of this Honorable Court in his letter under date of December 23, 1949, the reply brief of the appellee and its brief as cross-appellant are incorporated under one cover.

Preliminary Statement.

Cross-appellant, by reference thereto, incorporates herein that portion of appellant's opening brief set forth on pages 2 and 3, with the same effect as though repeated *verbatim* here.

Statement of the Case.

Cross-appellant incorporates, by reference thereto, its "Statement of the Case" contained in its Reply to Appellant's Opening Brief, and in addition thereto sets forth the following:

The trial court found that prior to the 8th day of November, 1946,

> "respondent herein employed the libelant as an oiler upon the SS 'Catalina' as a permanent employee at wages in the sum of $10.88 per day, overtime, and one dollar per day subsistence, on a six day per week basis." [Ap. p. 43.]

The trial court also found

> "that on the 8th day of November, 1946, (while) libelant was leaving the premises of the respondent, at Wilmington, California, and in the service of his vessel, (he) was struck by an automobile inflicting injuries upon him. . . ." (Matter in parentheses added for the reason that the omissions are no doubt typographical errors.) [Ap. pp. 43-44.]

The trial court also found

> "that libelant is entitled to recover maintenance for a period of 81 days at a rate of $4.50 per day all to the sum of $364.50 on account of which respondent, on February 27, 1947, paid to libelant the sum of $200.00." [Ap. p. 44.]

Assignment of Errors.

The Assignment of Errors upon which the cross-appellant relies are set forth in the Appendix to this brief, and are summarized in the following statement of points involved in the cross-appeal.

I.

THE DISTRICT COURT ERRED IN FINDING THAT THE CROSS-APPELLEE WAS EMPLOYED AS A PEAMANENT EMPLOYEE, THAT HE WAS INJURED WHILE LEAVING THE PREMISES OF RESPONDENT AND WAS IN THE SERVICE OF HIS VESSEL AT THE TIME HE WAS STRUCK BY AN AUTOMOBILE.

II.

THE DISTRICT COURT ERRED IN FINDING THAT THE LIBELANT WAS ENTITLED TO RECOVER MAINTENANCE IN ANY SUM WHATSOEVER.

III.

THE DISTRICT COURT ERRED IN CONCLUDING THAT LIBELANT IS ENTITLED TO RECOVER FROM RESPONDENT THE SUM OF $164.50 AND HIS COSTS OF COURT.

Outline of Argument.

1. This appeal is a trial *de novo.*

2. Cross-appellee was not entitled to recover any maintenance.

3. Cross-appellee was not employed as a permanent employee but was employed on a daily basis. Each day there was a complete voyage and the cross-appellee had concluded all of his services and was not subject to the call of duty and was therefore not entitled to any maintenance whatever. He was not leaving the premises. He had left the premises and was on a public sidewalk.

ARGUMENT.

I.

This Appeal Is a Trial De Novo.

This Honorable Court has rendered so many decisions holding that an admiralty appeal is a trial *de novo* that citation of authority is unnecessary to establish this contention.

II.

The Evidence Does Not Support the Finding That Libelant Was a Permanent Employee of Respondent.

The written contract pursuant to which the cross-appellee became an employee of the cross-appellant has been referred to in that portion of this brief answering the contentions of the appellant. In the interests of brevity it seems unnecessary to repeat what has been said with reference to that contract, its legal effect, and the statutes of the

State of California applicable thereto. For that reason the argument set forth in appellee's reply brief is by reference thereto incorporated herein.

Cross-appellant earnestly suggests that the finding made by the learned trial judge with reference to the proposition that "respondent herein employed the libelant as an oiler upon the S.S. 'Catalina' as a permanent employee" was an inadvertence. Certainly the trial judge did not intend to make any such finding. However the fact is that the finding appears in the record and cross-appellant therefore contends that there is absolutely no evidence in the record which will support this finding. The contract shows that the cross-appellee was employed on a daily basis. The entire proposition is, in the final analysis, left to the sound discretion of this Honorable Court trying this case *de novo*. This particular finding should be corrected by this Honorable Court by striking out the word "permanent" and also striking out the words "on a six day per week basis."

In all probability the libelant did work approximately six days of each week between May 18, 1946, and November 8, 1946, but that fact does not establish his contention that he was employed on a weekly basis or on a permanent basis. As a matter of law there could not be an employment on a "permanent" basis. "Permanent" means forever.

III.

The Evidence Does Not Support the Findings of the Trial Court That the Cross-Appellee Is Entitled to Maintenance.

It is well settled that whenever a seaman is injured in the service of his vessel he is entitled to maintenance until a maximum degree of cure is effected. Cross-appellant respectfully contends that this rule does not mean that a seaman employed on the basis upon which cross-appellee was employed and who was completely free of all possible duties to the vessel from the time he left it each night until he got back in the morning is entitled to be maintained at the expense of the vessel when he is struck by a hit-and-run driver on a public sidewalk. There is no question with reference to any period of recreation involved in this case. Neither is there any proposition involving shore leave. The cross-appellee had his own home and went there every night.

It is respectfully contended that the United States Supreme Court went about as far as any court should go with reference to the question of maintenance in the case of *Aguilar v. Standard Oil Co.,* 318 U. S. 724, 87 L. Ed. 1107. There is, however, nothing in that decision which supports an award of maintenance to a man in the status of cross-appellee. In all of the cases with which cross-appellant is familiar, the seamen who have been awarded maintenance have been employed on a 24-hour basis for periods of time extending from the beginning of the term of employment to the end thereof. That situation does not exist in the case at bar.

Conclusion.

It is respectfully contended that the decree denying wages should be affirmed and the decree awarding maintenance to the cross-appellee should be reversed.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Appellee and Cross-Appellant, Catalina Island Steamship Line.

APPENDIX.

I.

The evidence is insufficient to support the finding that prior to the 8th day of November, 1946, respondent herein employed the libelant as an oiler upon the S.S. "Catalina" as a permanent employee.

II.

The evidence is insufficient to support the finding that the respondent employed the libelant as a permanent employee.

III.

The evidence is insufficient to support the finding that the respondent employed the libelant at wages in the sum of $10.88 per day and $1.00 per day subsistence.

IV.

The evidence is insufficient to support the finding that libelant's rate of pay included, or that he was paid in addition to the daily wage of $10.88, $1.00 per day subsistence.

V.

The evidence is insufficient to support the finding that on the 8th day of November, 1946, libelant was leaving the premises of the respondent at Wilmington, California, and in the service of his vessel was struck by an automobile.

VI.

The evidence is insufficient to support the finding that libelant was injured while leaving the premises of the respondent at Wilmington, California.

VII.

The evidence is insufficient to support the finding that libelant was struck by an automobile while libelant was in the service of his vessel.

VIII.

The evidence is insufficient to support the finding that libelant is entitled to recover maintenance for a period of 81 days or for any number of days, or at all.

IX.

The findings and conclusions that the libelant is entitled to recover any maintenance whatever are, and each thereof is, against law.

X.

The Court erred in concluding that libelant is entitled to recover from respondent the sum of $164.50 and his costs of Court.